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LIBERTY MEDIA HOLDINGS, LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA, LAS VEGAS DIVISION

LIBERTY MEDIA HOLDINGS, LLC Plaintiff, vs. SWARM OF NOVEMBER 15 to DECEMBER 9, 2010, SHARING HASH FILE AE340D0560129AFEE8D78CE07F2394C7 B5BC9C05; AND DOES 1 through 13, Defendants.	Case No. 2:11-cv-00637 **MOTION FOR EARLY DISCOVERY**

MOTION FOR EARLY DISCOVERY

Plaintiff, Liberty Media Holdings (hereinafter "Liberty" or the "Plaintiff") files this Motion for Early Discovery (hereinafter the "Motion") in the above-captioned case through its counsel, Randazza Legal Group. Plaintiff seeks leave of this Court to discovery the identities of Defendants John Does 1-13, which are essential to prosecuting the Complaint filed by Plaintiff in this case (Doc. # 1). To effectuate this goal, Plaintiff seeks Court order allowing it to propound discovery on Cox Communications for identifying information of the subscribers for the internet protocol addresses used at the times specified in Exhibit 1, which were used to distribute Plaintiff's copyrighted work using the BitTorrent protocol.

MEMORANDUM OF LAW AND POINTS OF AUTHORITY IN FAVOR OF PLAINTIFF'S MOTION FOR EARLY DISCOVERY

I. Introduction

Plaintiff Liberty Media Holdings (hereinafter, "Liberty") seeks the identities of all Doe defendants from their respective Internet Service Providers ("ISPs"), and seeks a Court order directing the ISPs to disclose the subscriber's personally identifiable information. The specific information being sought from each ISP is found on Exhibit 1. Additionally, Plaintiff requests permission to propound limited discovery in the form of interrogatories and depositions on any individual identified by these ISP's in order to determine whether or not the actual Internet subscriber is the proper defendant in this action.

II. Factual Background

Plaintiff Liberty is a California LLC doing business as CORBIN FISHER®. Liberty produces, markets, and distributes adult entertainment products, including Internet website content, videos, DVDs, photographs, etc. Plaintiff operates and maintains a website by and through which individuals who pay a monthly subscription fee can view its photographic and audiovisual works.

Defendant Does 1-13 are individuals whose true names and addresses are unknown to Plaintiff. These Doe Defendants duplicated and distributed unauthorized and infringing copies of Plaintiff's motion picture "Down on the Farm." Plaintiff has obtained the IP addresses assigned to the individual Defendants, however, Plaintiff can only further identify the infringers by way of further investigation. As such, the Plaintiff intends to subpoena the ISP in order to determine the identity of the Internet subscriber who was assigned the corresponding IP address on the date and time of infringement.

The information which Plaintiff will be requesting in the subpoenas issued to the ISPs is governed by 47 U.S.C. § 551, which prohibits cable operators from disclosing personally identifiable information pertaining to subscribers without the subscriber's express consent unless there is "a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed." 47 U.S.C. § 551(c)(2)(B).

Accordingly, the Plaintiff requests that the Court issue the requisite Order instructing Cox Communications, Charter Communications and Clearwire Corporation to produce any and all documents and/or information sufficient to identify the user or users of their respective IP addresses as listed in Exhibit 1 during the corresponding dates and times.

Additionally, Plaintiff requests permission to conduct early discovery on each user identified by these ISPs in order to determine (without further motions) whether the actual subscriber performed the acts complained of, or whether it was some other individual with access to the subscriber's Internet connection.

III. Argument

A. The Federal Rules of Civil Procedure Allow Early Discovery in This Case.

Federal Rules allow for discovery prior to a Rule 26 conference upon a showing of good cause. *See Semitool, Inc. v. Tokyo Electronic America, Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002).

More specifically, courts have recognized that, "[s]ervice of process can pose a special dilemma for plaintiffs in cases like this in which the tortious activity occurred entirely on-line." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999). Accordingly, courts have developed the following factors to consider when granting motions for expedited discovery to identify anonymous Internet users: (1) whether the plaintiff can identify the missing party with sufficient specificity such that the court can determine that defendant is a real person or entity who could be sued in federal court; (2) all previous steps taken by the plaintiff to identify the Doe defendant; and (3) whether the plaintiff's suit could withstand a motion to dismiss. *Id.* at 578-80. Each of these factors resolves in favor of granting Plaintiff's requested relief.

First, Plaintiff has sufficiently identified individuals who are real persons Plaintiff could sue in Federal Court. Plaintiff observed and documented infringement of its registered works by the individuals identified as Does 1-13 in the Complaint. The requested discovery is necessary for Plaintiff to determine the true name and address of the individuals who performed the infringing acts.

Second, there are no other practical measures Plaintiff could take to identify the Doe Defendants. Plaintiff is aware of no available information that would identify the infringing users, other than information maintained by their Internet Service Providers. Due to the nature of on-line transactions, Plaintiff has no way of determining Defendants' identities except through a third-party subpoena.

Third, Plaintiff has asserted prima facie claims for copyright infringement, contributory copyright infringement, civil conspiracy, and negligence in its Complaint that can withstand a motion to dismiss. Specifically, Plaintiff has alleged that a) it owns and has registered the copyright in the work at issue and b) the Defendants made unauthorized reproductions of those works and distributed them without Plaintiff's authorization. These allegations state a claim for copyright infringement. Similarly, the Defendants knew of their infringement, and were conscious of their uploading of Plaintiff's copyrighted work, and substantially participated in others' infringement of the Plaintiff's copyrighted work, which would have been impossible without Defendant's uploading and sharing of the file.

When outlining the above factors, the court in *Columbia* noted that in cases where injured parties are likely to find themselves chasing unidentified tortfeasors from ISP to ISP, the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances. *Columbia*, 185 F.R.D. at 579. An analysis of the factors clearly demonstrates Plaintiff's legitimate interest in identifying the name and address of the individuals who infringed upon its copyrighted works.

A claim for civil conspiracy must allege (1) formation and operation of the conspiracy, (2) wrongful act or acts done in furtherance thereto, and (3) the damage resulting from such acts. *Jones v. AIG Risk Management*, 726 F. Supp 2d 1049, 1060 (N.D. Cal. 2010); See also *Chicago Title Insurance Co. v. Great Western Financial Corp.* 69 Cal.2d 305, 316 (1968).

Here the purpose of the conspiracy is to traffic in infringing content. Defendants downloaded the BitTorrent client for the purpose of conspiring with other BitTorrent users to reproduce and distribute the Plaintiff's copyrighted work in violation of copyright laws. Each defendant used the BitTorrent network for the purpose of reproducing and exchanging infringing copies of the Plaintiff's copyrighted work in exchange for still more infringing content. As a result of the unlawful duplication and distribution of its copyrighted work, the Plaintiff has suffered damages to be determined at trial.

Additionally, Plaintiff's negligence cause of action will withstand a motion to dismiss. Negligent conduct may be "a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." Restatement 2d of Torts § 284. Defendants failed to secure their Internet access, which by virtue of this unsecured access, allowed the use of their Internet accounts to perform the complained of copying and sharing of Plaintiff's copyrighted motion picture.

B. Plaintiff's Specific Requests for Identifying Information About the Doe Defendants Will Make Identification and Service of the Defendants Possible.

In addition to the three factors discussed above, courts have indicated that a plaintiff requesting early discovery to identify defendants should justify specific requests and explain how such requests "will lead to identifying information about defendant that would make service of process possible." *See Columbia* 185 F.R.D. at 580; *see also Gillespie v. Civiletti*, 629 F. 2d 637, 642 (9th Cir. 1980).

The infringement and other wrongful acts at issue in this action occurred online. In order execute the illegal acts complained of, a user must connect to the Internet.

Individuals gain access to the Internet through an Internet service provider (ISP). When an ISP provides Internet access to a subscriber, it does so through a modem located at the subscriber's home or office. Each time the subscriber accesses the Internet, the ISP provides a unique number to the subscriber called an Internet protocol (IP) address. This is somewhat akin to a telephone number. The IP address for a subscriber may stay the same (a static IP address) or it may change from time to time (a dynamic IP address). ISPs generally record the times and dates it assigns each IP address to a subscriber.

Online technology used to engage in unlawful online theft relies on the ability to identify the computers to and from which users search and exchange files. The technology identifies those computers through the IP address from which the computer connects to the Internet. In this manner, Plaintiff identified the IP addresses from which individuals connected to the Internet for the purpose of unlawfully accessing Plaintiff's works, making electronic copies thereof, and further distributing these works. Plaintiff recorded the exact date and time individuals used various IP addresses to access the Internet to make illegally download, copy, and re-distribute the Plaintiff's copyrighted work.

Anyone can perform a simple search on public databases to determine which Internet access provider controls a specific IP address. Plaintiff now seeks to subpoena the above listed Internet Service Providers to determine the name and address of the subscribers to whom they assigned the various IP addresses recorded.

Plaintiff requests that the Court issue an order allowing Plaintiff to serve a subpoena on the relevant Internet Service providers requesting specific subscriber information necessary to identify the Doe defendants.

Since 47 U.S.C. §551 (The Cable Privacy Act) prohibits cable operators from disclosing personally identifiable information concerning subscribers without the prior written or electronic consent of the subscriber or a court order, and since some Internet service providers, including those listed above in this motion, are also cable operators, Plaintiff requests that the Court order state clearly that the Court contemplated the Cable Privacy Act and that the order specifically complies with the Act's requirements. See, 47 U.S.C. §551.

Additionally, the Internet subscriber is not always the proper defendant in actions such as this. Plaintiff therefore, seeks to depose and/or issue interrogatories to the Internet subscriber identified by each ISP in order to determine whether or not they are the proper defendant in this action. In the interest of judicial economy, the Plaintiff requests pre-authorization to conduct this supplemental discovery.

Conclusion

The Plaintiff requests that the Court issue the requisite Order instructing Cox Communications to produce any and all documents and/or information sufficient to identify the user or users of the above IP addresses during the corresponding dates and times as shown in Exhibit 1 hereto.

Plaintiff will only use this information to prosecute the claims made in its Complaint. Without this information Plaintiff cannot pursue its lawsuit to protect its copyrighted works.

Such discovery should be conditioned on a) the ISPs having 7 calendar days after service of the subpoenas to notify the subscriber that their identity is sought by Plaintiff, and b) each subscriber whose identity is sought having 21 calendar days from the date of such notice to file any papers contesting the subpoena.

Plaintiff additionally requests permission to engage in limited discovery by issuing interrogatories and/or deposing the individuals identified by the ISPs in order to determine whether or not the Internet subscriber is the proper defendant in this action.

Date: April 22, 2011

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